

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NELAND TEVIONN GRAY JR.,

Petitioner,

vs.

DIANE SABATKA-RINE, Interim Director,
Nebraska Department of Correctional
Services;

Respondent.

8:23CV18

MEMORANDUM AND ORDER

This matter is before the court on preliminary review of Petitioner Neland Tevionn Gray Jr.'s Petition for Writ of Habeas Corpus, [Filing No. 1](#), brought pursuant to [28 U.S.C. § 2254](#). Also before the Court is Petitioner's Motion to Appoint Counsel, [Filing No. 5](#).

I. Preliminary Review

The purpose of this review is to determine whether Petitioner's claims, when liberally construed, are potentially cognizable in federal court. Condensed and summarized for clarity, Petitioner's claims are:

Claim One: Petitioner received ineffective assistance of trial counsel because trial counsel failed to investigate and gather evidence to support a lesser included charge of manslaughter.

Claim Two: Petitioner received ineffective assistance of trial counsel because trial counsel advised Petitioner to waive his right to personal service, a 24-hour waiting period, and the preliminary hearing.

Claim Three: Petitioner received ineffective assistance of counsel on direct appeal because appellate counsel failed to raise the grounds from Petitioner's Claim One and Claim Two on direct appeal.

Claim Four: Petitioner received ineffective assistance of counsel on direct appeal because appellate counsel failed to argue that Petitioner's sentences were grossly disproportionate to the crimes, in violation of the Eighth and Fourteenth Amendments of the United States Constitution.¹

The Court determines that these claims, when liberally construed, are potentially cognizable in federal court. However, the Court cautions Petitioner that no determination has been made regarding the merits of these claims or any defenses to them or whether there are procedural bars that will prevent Petitioner from obtaining the relief sought.

II. Motion to Appoint Counsel

Petitioner requests the appointment of counsel. [Filing No. 5](#). “[T]here is neither a constitutional nor statutory right to counsel in habeas proceedings; instead, [appointment] is committed to the discretion of the trial court.” [*McCall v. Benson*, 114 F.3d 754, 756 \(8th Cir. 1997\)](#). As a general rule, counsel will not be appointed unless the case is unusually complex or the petitioner’s ability to investigate and articulate the claims is unusually impaired or an evidentiary hearing is required. See, e.g., [*Wiseman v. Wachendorf*, 984 F.3d 649, 655 \(8th Cir. 2021\)](#); [*Morris v. Dormire*, 217 F.3d 556, 558–59 \(8th Cir. 2000\)](#), cert. denied, [531 U.S. 984 \(2000\)](#); [*Hoggard v. Purkett*, 29 F.3d 469, 471 \(8th Cir. 1994\)](#). See also Rule 8(c) of the *Rules Governing Section 2254 Cases in the*

¹ The Petition states Claim Four as: “Direct appeal counsel was ineffective for failing to assign and argue plain error on direct appeal on behalf of Gray.” [Filing No. 1 at 11](#). Because this statement was broad and somewhat vague, the Court draws its summary above, in part, from Petitioner’s accompanying brief. [Filing No. 1 at 28](#).

United States District Courts (requiring appointment of counsel if an evidentiary hearing is warranted). The Court has carefully reviewed the record and finds there is no need for the appointment of counsel at this time.

IT IS THEREFORE ORDERED that:

1. By **October 10, 2023**, Respondent must file a motion for summary judgment or state court records in support of an answer. The Clerk of the Court is directed to set a pro se case management deadline in this case using the following text: **October 10, 2023**: deadline for Respondent to file state court records in support of answer or motion for summary judgment.
2. If Respondent elects to file a motion for summary judgment, the following procedures must be followed by Respondent and Petitioner:
 - A. The motion for summary judgment must be accompanied by a separate brief, submitted at the time the motion is filed.
 - B. The motion for summary judgment must be supported by any state court records that are necessary to support the motion. Those records must be contained in a separate filing entitled: "Designation of State Court Records in Support of Motion for Summary Judgment."
 - C. Copies of the motion for summary judgment, the designation, including state court records, and Respondent's brief must be served on Petitioner *except* that Respondent is only required to provide Petitioner with a copy of the specific pages of the record that are cited in Respondent's motion and brief. In the event that the designation of state court records is deemed insufficient by Petitioner

or Petitioner needs additional records from the designation, Petitioner may file a motion with the Court requesting additional documents. Such motion must set forth the documents requested and the reasons the documents are relevant to the cognizable claims.

- D. No later than 30 days following the filing of the motion for summary judgment, Petitioner must file and serve a brief in opposition to the motion for summary judgment. Petitioner may not submit other documents unless directed to do so by the Court.
- E. No later than 30 days after Petitioner's brief is filed, Respondent must file and serve a reply brief. In the event that Respondent elects not to file a reply brief, she should inform the Court by filing a notice stating that she will not file a reply brief and that the motion is therefore fully submitted for decision.
- F. If the motion for summary judgment is denied, Respondent must file an answer, a designation and a brief that complies with terms of this order. (See the following paragraph.) The documents must be filed no later than 30 days after the denial of the motion for summary judgment. **Respondent is warned that failure to file an answer, a designation and a brief in a timely fashion may result in the imposition of sanctions, including Petitioner's release.**

3. If Respondent elects to file an answer, the following procedures must be followed by Respondent and Petitioner:

- A. By **October 10, 2023**, Respondent must file all state court records that are relevant to the cognizable claims. See, e.g., Rule 5(c)-(d) of the *Rules Governing Section 2254 Cases in the United States District Courts*. Those records must be contained in a separate filing entitled: "Designation of State Court Records in Support of Answer."
- B. No later than 30 days after the relevant state court records are filed, Respondent must file an answer. The answer must be accompanied by a separate brief, submitted at the time the answer is filed. Both the answer and the brief must address all matters germane to the case including, but not limited to, the merits of Petitioner's allegations that have survived initial review, and whether any claim is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, a statute of limitations, or because the petition is an unauthorized second or successive petition. See, e.g., Rules 5(b) and 9 of the *Rules Governing Section 2254 Cases in the United States District Courts*.
- C. Copies of the answer, the designation, and Respondent's brief must be served on Petitioner at the time they are filed with the Court except that Respondent is only required to provide Petitioner with a copy of the specific pages of the designated record that are cited in Respondent's answer and brief. In the event that the designation of state court records is deemed insufficient by Petitioner or Petitioner needs additional records from the designation, Petitioner may file a

motion with the Court requesting additional documents. Such motion must set forth the documents requested and the reasons the documents are relevant to the cognizable claims.

- D. No later than 30 days after Respondent's brief is filed, Petitioner must file and serve a brief in response. Petitioner must not submit any other documents unless directed to do so by the Court.
- E. No later than 30 days after Petitioner's brief is filed, Respondent must file and serve a reply brief. In the event that Respondent elects not to file a reply brief, she should inform the Court by filing a notice stating that she will not file a reply brief and that the merits of the petition are therefore fully submitted for decision.
- F. The Clerk of the Court is directed to set a pro se case management deadline in this case using the following text: **November 9, 2023:** check for Respondent's answer and separate brief.

4. No discovery shall be undertaken without leave of the Court. See Rule 6 of the *Rules Governing Section 2254 Cases in the United States District Courts*.

5. Petitioner's Motion to Appoint Counsel, [Filing No. 5](#), is denied without prejudice to reassertion.

Dated this 24th day of August, 2023.

BY THE COURT:



Joseph F. Bataillon
Senior United States District Judge